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7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 DAVID B. TURNER, Jr.,

12 Plaintiff,

13 vs.

14 SAN DIEGO CENTRAL JAIL;
15 CORPORAL SAUNDERS; DEPUTY
16 TORRES; SAN DIEGO COUNTY
SHERIFFS,

Defendant.

Civil No. 13cv1133-WQH

ORDER

17 HAYES, Judge:

18 The matter before the Court is the review of the Report and Recommendation
19 (ECF No. 24) issued by the United States Magistrate Judge recommending that this
20 Court grant Defendants' motions to dismiss (ECF Nos. 9 and 12).

21 **I. Background**

22 On May 10, 2013, Plaintiff filed a complaint against Defendants pursuant to 42
23 U.S.C. § 1983 alleging constitutional claims for actions which occurred on March 21,
24 2013, March 22, 2013 and April 7, 2013. (ECF No.1). All actions are alleged to have
25 occurred while Plaintiff was incarcerated at the San Diego Central Jail. Plaintiff alleges
26 claims for excessive force, deliberate indifference to medical needs, and denial of right
27 to religious services.

28 Defendants move to dismiss the complaint on the grounds that Plaintiff failed to
exhaust administrative remedies prior to filing this action. Defendants further contend

1 that the claim for excessive force is barred on the grounds that Plaintiff cannot
2 collaterally attack his conviction for unlawfully resisting or preventing deputies from
3 performing their duties on March 21, 2013 in this action under 42 U.S.C. § 1983.

4 On September 6, 2013, the Court provided Plaintiff with notice of the motion to
5 dismiss for failure to exhaust pursuant to *Wyatt v. Terhune* providing Plaintiff with
6 additional time to file a response to the motions to dismiss. (ECF No. 23).

7 Plaintiff did not file any response to the motions to dismiss.

8 On October 8, 2013, the Magistrate Judge issued the Report and
9 Recommendation, recommending that Defendants' motions to dismiss be granted.
10 (ECF No. 24). The Report and Recommendation concluded: "IT IS HEREBY
11 ORDERED that no later than November 8, 2013, after receiving a copy of this Report
12 and Recommendation, any party to this action may file written objections with the
13 Court and serve a copy on all parties." *Id.* at 7.

14 Neither party filed objections to the Report and Recommendation.

15 **II. Review of the Report and Recommendation**

16 The duties of the district court in connection with a report and recommendation
17 of a magistrate judge are set forth in Federal Rule of Civil Procedure 72(b) and 28
18 U.S.C. § 636(b)(1). When a party objects to a report and recommendation, "[a] judge
19 of the [district] court shall make a de novo determination of those portions of the [report
20 and recommendation] to which objection is made." 28 U.S.C. § 636(b)(1). When no
21 objections are filed, the district court need not review the report and recommendation
22 de novo. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121-22 (9th Cir. 2003) (en
23 banc). A district court may "accept, reject, or modify, in whole or in part, the findings
24 or recommendations made by the magistrate judge." Fed. R. Civ. P. 72(b); *see also* 28
25 U.S.C. § 636(b)(1).

26 Neither party objected to the Report and Recommendation, and the Court has
27 reviewed the Report and Recommendation in its entirety. The Magistrate Judge
28 correctly recommended: "Without any facts or evidence to indicate Plaintiff followed

1 the required procedures and exhausted his claims prior to filing the action, Defendants'
2 nonenumerated 12(b) motions be GRANTED because pursuant to the [Prison Litigation
3 Reform Act of 1995], exhaustion is mandatory.” (ECF No. 24 at 7).

4 **IV. Conclusion**

5 IT IS HEREBY ORDERED that the Report and Recommendation is ADOPTED
6 in its entirety. (ECF No. 24)

7 IT IS FURTHER ORDERED that Defendant’s motions to dismiss (ECF Nos. 9
8 and 12) are granted and this action is dismissed without prejudice.

9 DATED: December 4, 2013

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11 **WILLIAM Q. HAYES**
12 United States District Judge
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